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International cooperation under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures

Note by the UNCTAD secretariat

Summary

This note presents the status quo of international cooperation in the context of the work of UNCTAD, including research carried out since 2012, the latest work of the discussion group on international cooperation established in 2017 and the findings of an UNCTAD survey on obstacles to international cooperation conducted in 2018. The note also outlines a way forward after 2020, suggesting reinforcing the role of UNCTAD in the area of international cooperation. The guiding policies and procedures in implementing international measures under section F of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, endorsed by member States at the eighteenth session of the Intergovernmental Group of Experts on Competition Law and Policy, are presented for consideration and approval by the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.



I. Introduction

1. UNCTAD is the focal point on work related to competition and consumer protection law and policy within the United Nations system which, in turn, is part of its work on trade and development. The work of UNCTAD in the area of competition dates to the adoption of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980. This work represents an acceptance of the view that the basic norms of competition law, which have long been in use in developed countries, should extend to the operations of enterprises, including transnational corporations, in developing countries.

2. The objectives of the United Nations Set emphasize that the interests of developing countries in particular should be taken into account in the elimination of the disadvantages to trade and development that may result from restrictive business practices (now known as anticompetitive practices). In addition, the objectives state that adoption of the United Nations Set at the international level may facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels. At present, almost 140 countries across all continents, including developing countries and countries with economies in transition, have adopted competition laws.¹ Similarly, regional competition laws, enhancing the investigation of cross-border anticompetitive practices, are also being enacted and implemented in several regional economic organizations, such as under the Eurasian Economic Commission. UNCTAD has contributed by assisting developing countries in the enactment of their competition laws.

3. The proliferation of competition laws, national or regional, is partly due to the fact that business transactions increasingly operate in a globalized context, requiring international cooperation in investigations and the rethinking of the appropriate tools and procedures with which to conduct them. International cooperation among competition authorities therefore arises as a forward-thinking solution to dealing with the harmful effects of cross-border anticompetitive practices. In developing countries, cooperation within regional networks, including transcontinental cooperation between Brazil, China, India, the Russian Federation and South Africa, is essential in fostering the use of strategic tools at a regional level with trickle down effects to localized markets and in improving their leverage in cooperating and coordinating with advanced competition authorities in developed countries.

4. Despite the willingness to cooperate and increasing need for cooperation between competition authorities to deal with cross-border anticompetitive practices, many hurdles remain in terms of cooperation on specific cases, due to the lack of multijurisdictional cooperation, which is essential at a regional level among developing countries. The international community has devoted efforts to improving competition law enforcement in order to effectively address the harmful effects of global anticompetitive practices. Such efforts have included promoting the convergence of the laws, regulations and practices of competition authorities, through work undertaken by the International Competition Network and discussions of global issues held at meetings of the Organization for Economic Cooperation and Development and annual sessions of the Intergovernmental Group of Experts on Competition Law and Policy.

5. The development of guidance on international cooperation in this area began at the Sixth Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, when the competition commission of Costa Rica proposed modalities for the implementation of the voluntary consultations provided for in section F of the United Nations Set, on international measures.² The topic of international cooperation was addressed at subsequent sessions of the Intergovernmental Group of Experts on Competition Law and Policy in 2012–2015. At the session in 2016, the Federal Antimonopoly Service of the Russian Federation

¹ See <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>. *Note:* All websites referred to in footnotes were accessed in July 2020.

² TD/RBP/CONF.7/11. See the contribution from Costa Rica available at <https://unctad.org/en/pages/MeetingsArchive.aspx?meetingid=17888>.

proposed the establishment of practical tools of cooperation among competition authorities based on section F and, in 2017, UNCTAD established a discussion group on international cooperation to discuss ways and means of improving international cooperation under section F.³ The outcome was a draft set of guiding policies and procedures under section F, aimed at providing avenues for how competition authorities can better cooperate, including the role of UNCTAD in this area.

6. The guiding policies and procedures in implementing international measures under section F were endorsed by member States at the eighteenth session of the Intergovernmental Group of Experts and UNCTAD was asked to disseminate them across regions, involving business and academia, during the preparatory year before the Eighth United Nations Conference to Review All Aspects of the Set.⁴ In this way, the guiding policies and procedures could become more widely known and recognized among member States and relevant stakeholders, and could serve as a comprehensive and practical guidance instrument on, and to trigger and assist, cooperation among competition authorities worldwide, in particular between young and experienced authorities. Importantly, the guiding policies and procedures should be used in actual cases in practice, so that young authorities can more effectively address the impacts and harmful effects of cross-border anticompetitive practices in their jurisdictions.

7. In this context, this note presents the status quo of international cooperation in the context of the work of UNCTAD, including research carried out since 2012, the latest work of the discussion group on international cooperation established in 2017 and the findings of an UNCTAD survey on obstacles to international cooperation conducted in 2018.⁵ The note also highlights how the guiding policies and procedures were developed and presents the main features, together with related challenges. Finally, the note outlines a way forward after 2020, suggesting that the role of UNCTAD in international cooperation in competition law and policy should be reinforced.

II. Background on the work of UNCTAD in international cooperation in competition law and policy

8. Section F of the United Nations Set states that collaboration at the international level should aim to eliminate or effectively deal with restrictive business practices by strengthening and improving controls over such practices that adversely affect international trade and economic development, in particular in developing countries. In addition, section F details the assistance to be provided by UNCTAD, to support Member States in implementing such collaboration, including, among others, annual communications between member States and UNCTAD of appropriate information on steps taken to meet their commitment to the United Nations Set; publication by UNCTAD of a report on developments in competition laws and anticompetitive practices based on publicly available information and other information provided by member States; and establishment of a consultation mechanism that member States can use in order to find a mutually acceptable solution to an issue concerning the control of restrictive business practices affecting both members, with which UNCTAD may assist, as follows:

“Consultations: (a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation; (b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the

³ TD/B/C.I/CLP/40; TD/B/C.I/CLP/47.

⁴ TD/B/C.I/CLP/55, chapter I, paragraphs 6 and 7.

⁵ See the report of the discussion group on international cooperation at <https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1675>.

consultation should take place at an appropriate time; (c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.⁶

9. Costa Rica in 2010 and the Russian Federation in 2016 proposed modalities for the implementation of the voluntary consultations provided for in section F and the establishment of practical tools of cooperation. The annual sessions of the Intergovernmental Group of Experts on Competition Law and Policy in 2012–2017 considered topics related to the challenges faced by competition authorities in developing countries, different aspects of international cooperation and competition issues in specific sectors or areas.⁷ In addition, international cooperation in merger cases was discussed at the Seventh United Nations Conference to Review All Aspects of the Set.⁸ The notes prepared by UNCTAD highlighted the following:

(a) Competition authorities in developing countries and countries with economies in transition face significant challenges when investigating cartels at the cross-border level. Issues related to the lack of effective leniency programmes, the lack of physical presence of companies, the lack of comparable sanctions for cartelists and, to some extent, the lack of mutual interest and trust to facilitate information-sharing have led to difficulties in successfully undertaking multijurisdictional cartel investigations;

(b) Discussions at the Intergovernmental Group of Experts have focused on the consolidation of informal cooperation schemes through regional organizations and other arrangements worldwide, in particular those that include young competition authorities. For example, the Lima Declaration is an informal cooperation agreement among the competition agencies of Colombia, Chile and Peru that has the following aims: share experiences gained from enforcing their respective laws; conduct studies and research on topics of interest for all of the agencies; and take steps to improve the level of integration of the agencies by means of periodic informal meetings, taking into consideration the timing of regional and international forums.⁹ This agreement has yielded results as it has promoted a better understanding of each other's laws, assessment criteria and designs of remedies and sanctions, as well as transparency in procedures, processes and designs, and has led to the development of appropriate solutions to legal limitations;

(c) Provisions should be included in national competition laws that allow for cooperation and exchanges of information for enforcement purposes, and clear safeguards should be established and implemented for due process and the protection of confidential information at the national and international levels;

(d) Other activities have been implemented by some competition authorities as a part of international cooperation, focused on information sharing on case procedures; organizing workshops to consider finalized cases, that is, a similar case undertaken in a different jurisdiction; undertaking post-case analysis of information gathered, the strategy and evidence and to share experiences; identifying lessons and areas in which informal cooperation would have been helpful; building a databank of such shared experiences and building capacity enhancement programmes based on lessons learned; and developing knowledge management techniques to share such information, locally and across borders.¹⁰

⁶ TD/RBP/CONF/10/Rev.2.

⁷ Cross-border anticompetitive practices: The challenges for developing countries and economies in transition (TD/B/C.I/CLP/16); Modalities and procedures for international cooperation in competition cases involving more than one country (TD/B/C.I/CLP/21); Informal cooperation among competition agencies in specific cases (TD/B/C.I/CLP/29); Enhancing international cooperation in the investigation of cross-border cases (TD/B/C.I/CLP/44); Challenges faced by developing countries in competition and regulation in the maritime transport sector (TD/B/C.I/CLP/49); Competition issues in the sale of audiovisual rights for major sporting events (TD/B/C.I/CLP/50); Competition issues in the digital economy (TD/B/C.I/CLP/54).

⁸ TD/RBP/CONF.8/4.

⁹ TD/B/C.I/CLP/29.

¹⁰ Ibid.

III. Obstacles to international cooperation

10. As partly shown in the notes prepared by UNCTAD for sessions of the Intergovernmental Group of Experts, despite the existence of multiple frameworks among competition authorities, international cooperation still does not occur frequently. International organizations, including UNCTAD, have conducted research on the experiences of competition authorities with international cooperation and ways to foster it. For example, the International Competition Network and the Organization for Economic Cooperation and Development have jointly conducted a survey on international enforcement cooperation, through which limitations and constraints were identified by 23 authorities of States members of the Organization for Economic Cooperation and Development and 13 authorities of non-member States, while 16 authorities had insufficient cooperation experience to comment and 3 authorities handled only domestic or regional cases.¹¹ The International Competition Network has published a survey report on its framework for merger review cooperation, responding to the fact that the framework had not been used as often in practice as expected.¹² UNCTAD, under the framework of the discussion group on international cooperation, conducted a survey in 2018 on obstacles that competition authorities had encountered when cooperating with other authorities. The survey showed that international cooperation was regarded as useful by competition authorities, but sometimes did not take place or continue as they had expected.

11. Based on such studies and surveys, factors that restrict international cooperation may be grouped under two categories, namely, legal and practical limitations, as follows:

(a) Legal limitations may be summarized as restrictions on the exchanges of certain types of information under domestic laws, in particular confidential information; the absence of waivers of confidentiality; the presence of different legal enforcement systems, namely regarding criminal and/or administrative proceedings; and the lack of formal cooperation mechanisms;

(b) Practical limitations include the lack of: trust between competition authorities; prior interaction and mutual understanding; awareness of the possible cooperation methods; and resources.

12. Legal and practical limitations seem to be related. For example, the lack of understanding of another authority's legal framework leads to uncertainty about the other authority's confidentiality laws and practices, resulting in unwillingness to exchange information. In addition, both legal and practical limitations may limit willingness to contact other competition authorities to initiate cooperation.

13. The survey conducted by UNCTAD gathered possible solutions to obstacles to international cooperation. With regard to issues related to awareness, respondents suggested the implementation of international awareness programmes on international cooperation through capacity-building and training activities between larger and smaller authorities. With regard to issues related to legal reform and institutions, respondents recommended the following: developing specific national legislation to enable international cooperation; changing the institutional design of the competition authority, for example to lead to greater independence; more resources for cooperation, such as additional funding, more staff and additional interpreters; and the use of mechanisms and procedures for international cooperation established at the international level. With regard to practical issues, respondents recommended the following: pursuing trust-building activities; updating a directory of contacts in the international units of competition authorities; requesting assistance or the facilitation of cooperation from UNCTAD; and further developing the United Nations Set to establish mechanisms for international cooperation in concrete cases.

¹¹ See <https://www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm>.

¹² See <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Framework-Survey-Report.pdf>.

IV. Development of the guiding policies and procedures

A. Process

14. The Federal Antimonopoly Service of the Russian Federation addressed the need to enhance international cooperation to effectively fight cross-border anticompetitive practices and suggested a new initiative under section F of the United Nations Set, presenting a toolkit titled “International cooperation of competition authorities on combating restrictive business practices of transnational corporations and transborder violations of rules of competition”.¹³ The goal of the toolkit was to “provide effectiveness and efficiency of competition authorities, or other institutions exercising functions of control and supervision over competition, on issues of detection, prevention and suppression of restrictive business practices of companies exercising their activity on the territory of States”.¹⁴ The toolkit covered a number of topics related to notification, the exchange of information, the exchange of confidential information, enforcement cooperation, consultation, conflict avoidance, regional cooperation and requests for UNCTAD assistance.

15. Delegates at the sixteenth session of the Intergovernmental Group of Experts on Competition Law and Policy requested the UNCTAD secretariat to facilitate the establishment of a discussion group to discuss ways and means that would improve international cooperation under the United Nations Set.¹⁵ The discussion group, coordinated by UNCTAD, was open to participation by member States on a voluntary basis.¹⁶ At the seventeenth session of the Intergovernmental Group of Experts, the mandate of the discussion group was extended until July 2019.¹⁷ Discussions took place in 2017–2019 at eight meetings and the discussion group also set up a drafting committee composed of representatives from the competition authorities of 10 member States,¹⁸ to achieve a consolidated text. An ad hoc expert group meeting on competition law and policy was held on 8 April 2019 to gather comments and suggestions on the draft text from member States and relevant stakeholders other than members of the discussion group.¹⁹

16. The guiding policies and procedures were welcomed and endorsed by the eighteenth session of the Intergovernmental Group of Experts in July 2019 and member States requested that they be submitted for consideration and approval by the Eighth United Nations Conference to Review All Aspects of the Set.²⁰ The three main sections address guiding principles, a toolkit for cooperation in competition cases and the role of UNCTAD in facilitating cooperation under section F. The guiding policies and procedures are non-binding, serving as a tool to facilitate communications between competition authorities; to promote mutual trust and understanding of each other’s legal frameworks; to facilitate contacts between authorities; and to clarify what is possible under existing schemes, in particular for young authorities with less experience of cooperation.

17. UNCTAD was asked to disseminate the guiding policies and procedures across regions, involving business and academia, during the preparatory year before the Eighth United Nations Conference to Review All Aspects of the Set.²¹ UNCTAD proactively disseminated them at the following meetings and events worldwide in 2019: ad hoc

¹³ TD/B/C.I/CLP/47.

¹⁴ See the contribution from the Russian Federation available at <https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1275>.

¹⁵ TD/B/C.I/CLP/47.

¹⁶ Participants included Argentina, Armenia, Austria, Belarus, Brazil, Croatia, El Salvador, Eswatini, Germany, Hungary, India, Indonesia, Italy, Japan, Mexico, the Russian Federation, South Africa, the United Kingdom of Great Britain and Northern Ireland and the United States of America (Department of Justice and Federal Trade Commission).

¹⁷ TD/B/C.I/CLP/52.

¹⁸ Austria, Ecuador, Italy, Japan, Kazakhstan, Mexico, the Russian Federation, South Africa and the United States (Department of Justice and Federal Trade Commission).

¹⁹ See <https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=2075>.

²⁰ TD/B/C.I/CLP/55, chapter I, paragraph 6.

²¹ TD/B/C.I/CLP/55, chapter I, paragraph 7.

workshop on international cooperation in competition law enforcement of the Competition Commission of the Philippines (July); annual meeting of the working group on trade and competition of the UNCTAD and Latin American and Caribbean Economic System (Paraguay, September); sixth international competition conference of Brazil, China, India, the Russian Federation and South Africa (Russian Federation, September); meeting of the expert group on competition of the Association of Southeast Asian Nations (Malaysia, October); competition conference of the Association of Southeast Asian Nations (Cambodia, November); Istanbul Competition Forum (Turkey, November); African Competition Forum (France, December); Global Forum on Competition of the Organization for Economic Cooperation and Development (France, December); and in 2020: Asian Competition Forum (Spain, January); Manila Forum on Competition in Developing Countries (January); and training seminar hosted by the Japan Fair Trade Commission, in cooperation with the Japan International Cooperation Agency (February).

B. UNCTAD activities after 2020

18. The guiding policies and procedures imply a new role and new activities for UNCTAD. Potential assistance by UNCTAD in developing confidentiality provisions and in promoting mutual trust among member States to support more effective cooperation involves the following activities:

(a) Providing publicly available legal texts and guidelines at the national and international levels that are relevant to cooperation, such as rules on confidentiality, investigations and data protection in different jurisdictions;

(b) Maintaining a list of contact persons in the competition authorities of member States who may facilitate cooperation, including contacts for particular types of conduct such as mergers and cartels;

(c) With reference to consultations that member States may wish to undertake within the framework of section F, providing support from UNCTAD in preparing the request for consultation, as well as with regard to the following:

(i) Advice on procedural matters within the scope of the consultation;

(ii) The provision of mutually agreed conference facilities by the Secretary-General of UNCTAD, if needed;

(iii) Guidance, in particular for authorities from developing countries and countries with economies in transition, concerning confidentiality assurances and any use of information shared in the course of such consultations, if necessary;

(iv) Interpretation of the provisions of the United Nations Set;

(v) Upon request and consent by the participating authorities, participation in the consultations.²²

19. Enabling factors for the effective implementation of the guiding policies and procedures as of 2020 may be as follows:

(a) Respect for domestic provisions in handling information: The guiding policies and procedures give due consideration to prevalent domestic laws and policies, in particular in jurisdictions in which international cooperation, mutual agreement and understanding might be a challenge. In this regard, prospective cooperation could follow the practical guidance in the guiding policies and procedures related to initial contacts; further communications among authorities; the timing of alignment; exchanges of information, confidentiality and waivers of confidentiality; and discussions on substance and case resolution. Some of these procedures may be more difficult to implement than others, depending on the legal, regulatory and practical considerations of the competition authority wishing to enter into an international cooperation scheme;

²² TD/B/C.I/CLP/55/Add.1.

(b) Devotion of internal resources to international cooperation: A major constraint to young or small competition authorities is the scarcity of resources dedicated to international cooperation activities. In many instances, it may be difficult for young or small competition authorities in developing countries and countries with economies in transition to establish a large team. Unless there is a clear need and justification to address a cross-border competition case that has a direct impact in a domestic jurisdiction, competition authorities may not be inclined to investigate and instead choose to investigate national-level anticompetitive practices. However, with the advent of the digital economy, which impacts all jurisdictions, in both developing and developed economies, it is unlikely that most significant anticompetitive practices can be deemed as having only a national effect;

(c) Provision of resources to UNCTAD to fulfil its new role: The role related to the knowledge management of information to be provided to member States, as well as to possible consultations with UNCTAD as part of international cooperation dialogues among authorities, requires the mobilization of extrabudgetary resources, in particular from member States and development cooperation partners;

(d) Development of trust: The guiding policies and procedures outline important principles of international cooperation in competition cases. To be beneficial, such cooperation should be based on mutual trust and founded on the ability of participating authorities to provide effective and credible assurance that shared information will be kept confidential and used for permitted purposes only. UNCTAD is mindful of the limitations that competition authorities in developing countries and countries with economies in transition may face in boosting the necessary trust vis-à-vis competition authorities in developed countries, and the use of the guiding policies and procedures will therefore depend on how trust is managed by such authorities. Trust requires the development of relationships through regular contact, such as through meetings and joint events.

20. Two activities will be undertaken by UNCTAD as of 2020 to help support the successful implementation of the guiding policies and procedures, namely, gathering data on international cooperation experiences by sending questionnaires to member States once a year; and providing information to member States on laws and regulations applicable to information exchanges, confidentiality rules, investigative powers and procedures, as well as data protection rules in different jurisdictions, through the collection and organization of publicly available texts and guidelines. These activities depend on the commitment and contribution of member States in providing information in a timely fashion.

V. Conclusions and recommendations

21. Following the Seventh Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, member States and UNCTAD embarked on an ambitious undertaking to address the challenges faced in developing countries when dealing with international cooperation in competition law enforcement. Efforts have yielded positive results and tangible outcomes.

22. The guiding policies and procedures under section F of the United Nations Set can be of assistance to competition authorities when dealing with cross-border anticompetitive practices, because they can help facilitate dialogue. They aim to be the starting point of a new era of work within the United Nations system in the area of international cooperation in competition law enforcement. The guiding policies and procedures are presented to the Eighth Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices for its consideration and approval.²³ Member States may wish to consider the following actions:

²³ See TD/B/C.I/CLP/55/Add.1.

(a) Continuing the dissemination and discussion of the guiding policies and procedures, targeting wider audiences and stakeholders, with an emphasis on related activities to be held in developing countries and countries with economies in transition;

(b) Acknowledging the practical guidance available in the guiding policies and procedures when dealing with a multijurisdictional investigation involving competition law enforcement activities, with a view to using the guiding policies and procedures in practice, including the role of UNCTAD in facilitating consultations;

(c) Committing to regularly report to UNCTAD on cooperation experiences in order that the new role of UNCTAD can be conducted in a timely fashion, including any requests for UNCTAD to assist member States in facilitating international cooperation in cross-border investigations.
